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13 ARIZONA SUPERIOR COURT
14 MOHAVE COUNTY

15 STATE OF ARIZONA,

16 Plaintiff,

17 vs.

18 JOHN CHARLES McCLUSKEY,

19 Defendant.

No. CR2010-00823

**MOTION FOR CAMERA
COVERAGE OF TRIAL, AFTER
JURY SELECTION**

(Assigned to the Honorable Steven F.
Conn)

[Oral Argument Requested]

20 Pursuant to Ariz. R. Sup. Ct. 122, Ariz. Const. art. II, § 11 and U.S. Const.
21 amend. I, KPNX Broadcasting Co. ("KPNX"), which produces "12 News," respectfully
22 requests that the Court permit camera coverage of the post-jury selection proceedings in
23 this matter. This Motion is supported by the following Memorandum of Points and
24 Authorities, and by the Declaration of Jerome Parra.



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VIRLYNN TINNEL
SUPERIOR COURT CLERK

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 Preliminary Statement

3 KPNX respectfully urges the Court to permit camera coverage of the trial in
4 this matter once jury selection is complete and the jury is seated. Last year, the Court
5 took steps to minimize the potential impact of pre-trial publicity on the Mohave County
6 jury pool by prohibiting camera coverage of all pre-trial hearings. [See Court's Oct. 14,
7 2010 Minute Entry] As the pre-trial period concludes and the June trial date (the "Trial")
8 approaches, KPNX calls upon the Court to revisit the issue of camera coverage under Rule
9 122. KPNX's request for camera coverage of the Trial *after* the jury is seated eliminates
10 the possibility that camera coverage of proceedings could taint the jury pool with pre-trial
11 publicity. Indeed, the Court's existing prohibition on pre-trial coverage -- together with an
12 instruction to jurors to avoid media coverage of the case -- is sufficient to protect the fair
13 trial rights of all parties. *E.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 555 (1976).

14 Rule 122 allows camera coverage except where there is a "likelihood of
15 harm arising from one or more" of the seven factors in the Rule that "outweighs the
16 benefit to the public of camera coverage." Ariz. R. Sup. Ct. 122(c). Where that balance
17 may have tilted toward restrictions on coverage in pre-trial hearings, it tips sharply toward
18 allowing camera coverage of the Trial. Indeed, the Trial is a matter of at least statewide
19 interest, involving the Government's prosecution of a Defendant who escaped a privately-
20 run prison, allegedly killed an Oklahoma couple at a New Mexico rest stop, and then led
21 authorities on a multi-state chase that ended in Eastern Arizona. As the Court noted in its
22 October 14, 2010 Minute Entry, far more people are interested in the Trial than can
23 physically attend the proceedings. Camera coverage will make news of the Trial more
24 accessible to the public, which is consistent with Arizona's tradition of open courtrooms.
25 *E.g., Ariz. Const. art. II, § 11* ("Justice in all cases shall be administered openly . . ."); *cf.*
26 *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) ("People in an open
27 society do not demand infallibility from their institutions, but it is difficult for them to
28 accept what they are prohibited from observing.").

1 KPNX has renewed its request for camera coverage because Rule 122's
2 safeguards – which allow the Court to order the cameras turned off at any time, protect the
3 identity of jurors and preserve the dignity of proceedings – adequately protect the interests
4 at stake at Trial. Ariz. R. Sup. Ct. 122(c), (d), (g). Simply put, “the benefit to the public
5 of camera coverage” now outweighs the likelihood of harm to any of the Rule 122 factors,
6 and KPNX respectfully requests the Court to allow camera coverage of the Trial. *E.g.*,
7 *Petition of WMUR Channel 9*, 813 A.2d 455, 460 (N.H. 2002) (citing studies that have
8 found that camera coverage “improves public perceptions of the judiciary and its
9 processes, improves the trial process for all participants, and educates the public about the
10 judicial branch of government.”).

11 Pertinent Background

12 On October 13, 2010, KPNX submitted a request for camera coverage of an
13 October 15, 2010 hearing and “subsequent events” in this case (the “Request”). The Court
14 determined that the Request applied to “any subsequent hearings” in both cases, and
15 issued a Minute Entry on October 14, 2010 that denied the Request. [Oct. 14, 2010
16 Minute Entry, at 1] In denying KPNX’s Request, the Court held that camera coverage
17 would impact the fair trial rights of the State and Defense. Specifically, the Court found
18 that camera coverage of the proceedings would (1) “make it more difficult to obtain a pool
19 of prospective jurors whose ability to be fair and impartial would not have been
20 undermined by pretrial publicity[]”; (2) make prospective jurors less willing to serve; and
21 (3) “distract the participants and [] detract from the dignity of the proceedings.” [*Id.* at 2]

22 On October 25, 2010, KPNX filed a Motion for Reconsideration of the
23 Court’s October 14 ruling, and the Court denied the Motion on October 28. KPNX
24 respectfully submits this Motion for Camera Coverage of Trial, After Jury Selection
25 because circumstances have changed since the Court considered this issue last October.
26 Specifically, the pre-trial period has almost entirely lapsed, and this Request addresses
27 only the Trial and events in the case that occur *after* the jury is impaneled. This eliminates
28

1 any risks posed by pre-trial publicity, but allows the benefits of camera coverage by
2 allowing interested members of the public from across the State to observe the Trial.

3 Argument

4 I. THE BENEFIT TO THE PUBLIC OF CAMERA COVERAGE OF THE TRIAL
5 OUTWEIGHS THE SLIGHT RISK OF HARM TO THE RULE 122 FACTORS.

6 When the Arizona Supreme Court revised Rule 122 in 2008, it recognized
7 for the first time “the benefit to the public of camera coverage.” Ariz. R. Sup. Ct. 122(c).
8 Under the new rule, courts may limit or prohibit camera coverage of courtroom
9 proceedings “only after making specific, on-the-record findings that there is a *likelihood*
10 *of harm* arising from one or more” of seven factors identified in the Rule “*that outweighs*
11 *the benefit to the public* of camera coverage.” *Id.* (emphasis added). Because there is no
12 likelihood of harm after the jury is seated that outweighs the public benefit of camera
13 coverage of the Trial, the Court should permit a KPNX camera to cover the proceedings
14 under the restrictions imposed by Rule 122.

15 A. The Court Has Adequately Addressed Concerns About Pre-trial Publicity by
16 Prohibiting Camera Coverage of Pre-Trial Proceedings.

17 In its October 14, 2010 Minute Entry on camera coverage, the Court
18 expressed concern over the potential harm camera coverage of pre-trial proceedings could
19 play in identifying an unbiased jury panel. The Court addressed the possible harmful
20 effects of pre-trial publicity on the jury pool by prohibiting pre-trial camera coverage of
21 the proceedings. Once the jury is selected and seated, however, camera coverage of the
22 Trial poses little risk to fair trial rights. *Chandler v. Florida*, 449 U.S. 560, 578-79 (1981)
23 (“[A]t present no one has been able to present empirical data sufficient to establish that the
24 mere presence of the broadcast media inherently has an adverse effect on [the judicial
25 process].”). Indeed, the preventative measures taken by the Court during the pre-trial
26 phase of the case have already insulated the jury pool from excessive pre-trial publicity.
27 Additional measures, such as the use of *voir dire*, will screen prospective jurors who may
28 have formed opinions about the case. *Press-Enterprise v. Superior Court*, 478 U.S. 1, 15

1 (1986) (“*Press-Enterprise II*”) (“Through *voir dire*, cumbersome as it is in some
2 circumstances, a court can identify those jurors whose prior knowledge of a case would
3 disable them from rendering an impartial verdict.”).

4 In addition, the Court can use less-restrictive means to address any concerns
5 about publicity caused by media coverage of the Trial. *E.g.*, *WLBT, Inc.*, 950 So. 2d 1196,
6 1199 (Miss. 2005). For example, the Court can admonish jurors not to watch television
7 coverage of the Trial or read accounts of the proceedings in newspapers or on the Internet.
8 *E.g.*, *Nebraska Press*, 427 U.S. at 564 (approving of “the use of emphatic and clear
9 instructions on the sworn duty of each juror to decide the issues only on evidence
10 presented in open court”). Judge Warren Darrow, the trial judge in *State v. Ray*, the
11 murder trial involving the prosecution of a self-help “guru” charged with the deaths of
12 three people who attended a sweat lodge ceremony, provided jury instructions that
13 admonish jurors to avoid media coverage of the case. [See Ex. A, Excerpt of March 1,
14 2011 Preliminary Jury Instructions, *State v. Ray*, Cause No. V1300CR201080049, Ariz.
15 Super. Ct., Yavapai County] Judge Darrow’s instructions warn jurors to “avoid all news
16 media coverage during the trial.” [*Id.*] In this way, the Court can accommodate the
17 tremendous public interest in monitoring this case while ensuring that the jury remains
18 faithful to its task. *WLBT*, 950 So. 2d at 1199 (“[T]he complete exclusion of cameras
19 should be resorted to only after less restrictive measures have been considered and found
20 to be inadequate.”).

21 B. Television Coverage Will Not Affect the Safety of Jurors or Their
22 Willingness to Serve.

23 Rule 122 explicitly protects the anonymity of jurors. Rule 122(k) provides
24 that “[c]overage of jurors in a manner that will permit recognition of individual jurors by
25 the public is *strictly forbidden*.” (Emphasis added). The Rule states that cameras “should
26 be placed so as to avoid photographing jurors *in any manner*.” Ariz. R. Sup. Ct. 122(k)
27 (emphasis added). Indeed, Judge Darrow’s instructions in *State v. Ray* provide: “There
28 will be cameras in the courtroom. Court rules require that the proceedings be

1 photographed or televised in such a way that no juror can be recognized.” [See Ex. A, at
2 4-5] In addition, the Arizona Supreme Court added additional protections when it revised
3 Rule 122 by *prohibiting* the use of cameras anywhere in the court building without
4 express permission from the court. Ariz. R. Sup. Ct. 122(l). Consequently, camera
5 coverage will not result in identification of jurors in any way.

6 KPNX’s journalists have years of experience covering criminal trials in full
7 compliance with Rule 122 and other court restrictions. [Declaration of Jerome Parra
8 (“Parra Decl.”) ¶ 2] KPNX has not violated Rule 122’s prohibition on identifying jurors.
9 [Parra Decl. ¶ 5] Indeed, the Station typically places its camera in the back of the
10 courtroom on the same side as the jury box, which makes even inadvertent coverage of
11 jurors virtually impossible. [*Id.* ¶ 4] In any event, if allowed to cover the Trial with a
12 camera, KPNX would faithfully observe Rule 122 and not photograph jurors. [*Id.* ¶¶ 2, 6-
13 7] Accordingly, concerns about juror availability and safety are adequately addressed by
14 Rule 122.

15 The Court also expressed concern that camera coverage “might make
16 potential jurors less willing to serve.” [Oct. 14, 2011 Minute Entry, at 2] Scientific
17 studies and experience under Rule 122 across Arizona suggest this is not the case. Indeed,
18 studies have found that “the psychological effect of cameras in the courtroom on trial
19 participants is no greater than when reporters wait outside on the courthouse steps with
20 cameras.” *WMUR*, 813 A.2d at 460. Mohave County, which had an estimated population
21 in 2009 of 194,825, has a relatively large jury pool – only slightly smaller than Yavapai
22 County. [See <http://quickfacts.census.gov/qfd/states/04/04025.html>] Consequently, it is
23 unlikely that camera coverage of the trial poses a likely risk to finding citizens willing to
24 serve as jurors. *E.g.*, *Mu’Min v. Virginia*, 500 U.S. 415, 428-29 (1991) (noting county
25 population of 182,537 was large enough to find unbiased panel).

1 C. Camera Coverage of the Trial Will Not Distract Participants or Detract from
2 the Dignity of the Proceedings.

3 KPNX has extensive experience covering criminal trials without distraction
4 or disruption. [Parra Decl. ¶ 2] *E.g.*, *WMUR*, 813 A.2d at 460 (“Numerous states have
5 conducted studies on the physical effects cameras and electronic media have on
6 courtrooms, finding minimal, if any, physical disturbance to the trial process.”). KPNX’s
7 cameras are small, silent, and do not require cables, power cords or additional lights. [See
8 Parra Decl. ¶ 3] The Station has covered numerous courtroom hearings – including high-
9 profile jury trials – without distracting participants or disrupting proceedings. [*Id.* at ¶ 2]
10 In addition, KPNX has covered proceedings in small courtrooms in old courthouses built
11 before television coverage was a consideration. [*Id.*] At bottom, “the increasingly
12 sophisticated technology available to the broadcast and print media today allows court
13 proceedings to be photographed and recorded in a dignified, unobtrusive manner, which
14 allows the [judge] to fairly and impartially conduct court proceedings.” *WMUR*, 813 A.2d
15 at 648-49.

16 II. THE PUBLIC WOULD BENEFIT FROM CAMERA COVERAGE OF THE
17 TRIAL.

18 The public has an acute interest in monitoring the outcome of this case,
19 which involves the investigation and prosecution of an inmate who escaped from a private
20 prison and participated in a multi-state crime spree. *See, e.g., Godbehere v. Phoenix*
21 *Newspapers, Inc.*, 162 Ariz. 335, 343, 783 P.2d 781, 789 (1989) (“It is difficult to
22 conceive of an area of greater public interest than law enforcement.”). As the Court
23 observed in its October 14, 2010 Minute Entry, the courtroom has “limited seating,”
24 meaning there are far more people interested in the Trial than can attend in person.
25 [Court’s Oct. 14, 2010 Minute Entry at 2]. Many people obtain news from television, and
26 camera coverage is the most accurate tool available to convey unfiltered information about
27 the courts and their proceedings to the public. [Parra Decl. ¶ 7] *E.g.*, *WMUR*, 813 A.2d at
28 459.

1 Camera coverage of the Trial is consistent with Arizona's long commitment
2 to open courts and transparent government. *E.g.*, Ariz. Const. art. II, § 11; Ariz. R. Sup.
3 Ct. 123(c)(1) ("Historically, this state has always favored open government and an
4 informed citizenry."). By contrast, prohibiting cameras in the courtroom impedes public
5 access to criminal proceedings. *WLBT, Inc.*, 905 So. 2d at 1199. As the Arizona Supreme
6 Court observed, "[d]emocracy blooms where the public is informed and stagnates where
7 secrecy prevails." *Phoenix Newspapers, Inc. v. Jennings*, 107 Ariz. 557, 561, 490 P.2d
8 563, 567 (1971).

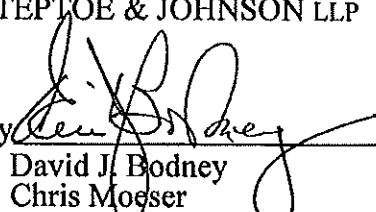
9 At bottom, the likelihood of harm to one of the Rule 122 factors does not
10 outweigh the "the benefit to the public of camera coverage," and KPNX respectfully
11 requests the Court to allow camera coverage of the Trial once jury selection is complete.
12 Ariz. R. Sup. Ct. 122(c); *cf. Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606
13 (1982) ("[p]ublic scrutiny of a criminal trial enhances the quality and safeguards the
14 integrity of the factfinding process, with benefits to both the defendant and society as a
15 whole.")

16 Conclusion

17 For the foregoing reasons, the Court should allow camera coverage of the
18 Trial after the jury is selected and seated, as provided in Ariz. R. Sup. Ct. 122.

19 RESPECTFULLY SUBMITTED this 9th day of May, 2011.

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1 Original of the foregoing shipped via FedEx
2 for filing with the Clerk of the Court this 9th day of
3 May, 2011, and

4 A copy of the foregoing was delivered
5 this same day via facsimile and U.S. Mail to:

6 Hon. Steven F. Conn
7 Division 3
8 Mohave County Superior Court
9 401 Spring Street
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MAR 1 2011

JEANNE HICKS, Clerk
By: T. Brogan

March 1, 2011
State of Arizona vs. James Arthur Ray
Cause No. V1300CR201080049

PRELIMINARY INSTRUCTIONS TO THE JURY

Duty of Jury:

Ladies and Gentlemen: Now that you have been sworn, I will tell you something about your duties as jurors and give you some instructions. At the end of the trial I will give you more detailed instructions. Those final instructions will replace these preliminary instructions and control your deliberations.

It is your duty to determine what the facts are in the case by determining what actually happened. Determine the facts only from the evidence produced in Court. When I say "evidence," I mean the testimony of witnesses and the exhibits introduced in Court. You should not speculate or guess about any fact. You must not be influenced by sympathy or prejudice. You must not be concerned with any opinion that you feel I have about the facts. You, as jurors, are the sole judges of what happened.

Importance of Jury Service:

Jury service is an important part of our system of justice, with a long and distinguished tradition in western civilization.

From the beginning, American law has viewed the jury system as an effective means of drawing on the collective wisdom, experience, and fact-finding abilities of persons such as yourselves. While it may be an occasional inconvenience, or worse, jury service is an important responsibility for you, one that I am sure you will take seriously.

Alternate Jurors:

Members of the jury, the law provides for a jury of 12 persons in a case such as this. In this case we have seated six alternate jurors so that,

it an argument. The purpose of an opening statement is to help you prepare for anticipated evidence.

Second, the State will present its evidence. After the State finishes, the Defendant may present evidence if he wishes. The State has the burden of proving the Defendant guilty beyond a reasonable doubt and the Defendant is not required to produce evidence of any kind. However, if the Defendant produces evidence, the State may present additional, or rebuttal, evidence.

With each witness, there is a direct examination, a cross examination by the opposing side, and finally a redirect examination. Then, members of the jury are given the opportunity to pose questions. This usually ends the testimony of that witness.

Third, after all the evidence is in, I will read and give you copies of the final instructions. These final instructions are the rules of law you must follow in reaching your verdict.

Fourth, the attorneys will make closing arguments to tell you what they think the evidence shows and how they think you should decide the case. The State has the right to open and close the arguments since the State has the burden of proof. Just as in opening statements, what is said in closing arguments is not evidence.

Fifth, you will deliberate in the jury room about the evidence and rules of law and decide upon a verdict. Once you agree upon a verdict, it will be read in court with you and the parties present.

Finally, you will be discharged and released from the restrictions I will read to you next.

Media Coverage:

There will be news media coverage of the trial. What the news media covers is up to them. You must avoid all news media coverage during the trial. If you do encounter something about this case in the news media during the trial, end your exposure to it immediately and report it to me as soon as you can. There will be cameras in the courtroom during the trial; do not be concerned about them. Court rules require that the proceedings

be photographed or televised in such a way that no juror can be recognized.

Admonition:

I am now going to say a few words about your conduct as jurors. I am going to give you some do's and don'ts, mostly don'ts, which I will call "The Admonition."

Do wear your juror badge at all times in and around the courthouse so everyone will know you are on a jury.

Each of you has gained knowledge and information from the experiences you have had prior to this trial. Once this trial has begun you are to determine the facts of this case only from the evidence that is presented in this courtroom. Arizona law prohibits a juror from receiving evidence not properly admitted at trial. Therefore, do not do any research or make any investigation about the case on your own. Do not view or visit the locations where the events of the case took place. Do not consult any source such as a newspaper, a dictionary, a reference manual, television, radio or the Internet for information. If you have a question or need additional information, submit your request **in writing** and I will discuss it with the attorneys.

One reason for these prohibitions is because the trial process works by each side knowing exactly what evidence is being considered by you and what law you are applying to the facts you find. As I previously told you, the only evidence you are to consider in this matter is that which is introduced in the courtroom. The law that you are to apply is the law that I give you in the final instructions. This prohibits you from consulting any outside source.

Do not talk to anyone about the case, or about anyone who has anything to do with it, and do not let anyone talk to you about those matters, until the trial has ended, and you have been discharged as jurors. Until then, you may tell people you are on a jury, and you may tell them the estimated schedule for the trial, but do not tell them anything else except to say that you cannot talk about the trial until it is over.